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**“JUDICIAL WATCH EDUCATIONAL PANEL:
THE SOTOMAYOR NOMINATION”**

MODERATOR:

TOM FITTON, PRESIDENT OF JUDICIAL WATCH, INC.

PANELISTS:

**MANUEL MIRANDA, CHAIRMAN,
THIRD BRANCH CONFERENCE**

**CURT LEVEY, EXECUTIVE DIRECTOR,
COMMITTEE FOR JUSTICE**

**ROGER CLEGG, PRESIDENT AND GENERAL COUNSEL
OF THE CENTER FOR EQUAL OPPORTUNITY**

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MR. TOM FITTON: (In progress) – when entering the court, let alone the Supreme Court. And if Judge Sotomayor’s feelings guide her judicial decisions, justice in her courtroom operates on a constantly shifting landscape, depending day to day, perhaps even moment to moment, on Judge Sotomayor’s moods, biases, and personal whims. In fact, that standard and that problem would arise under any presidential nominee of Barack Obama. How could anyone have confidence that justice would be served in this scenario?

It used to be the ability to completely set aside one’s personal feelings was the high mark of impartiality which all judges aspired to. Liberals want to turn impartiality, though, into a weakness so they can use courts to advance a political agenda that often has failed at the ballot box. That is what we call judicial activism. Conservatives believe when applying the rule of law there is only one standard: apply it equally at all times. Judges must ensure that all litigants are given a fair hearing, regardless of their personal feelings and biases.

This point seems to be lost on President Obama and presumably his Supreme Court nominee. And frankly, her speeches indicate that the point is lost on her. And so here is the question that members of the United States Senate must now answer. This is not longer a philosophical debate. Senators will be voting on whether they agree with this philosophy. Will they vote to confirm a justice who will make her decisions based on empathy and her personal feelings about a litigant? Or will they demand a nominee who uses the rule of law as a principal guide, applying the law equally to everyone who comes before the court, regardless of race, gender or sexual orientation?

If members of the U.S. Senate care one whit about the U.S. Constitution, it seems to me they will reject this appointment. And I just don’t mean Republicans. I mean Democrats as well.

And let me be clear, it will be up to everyday Americans to show leadership on this. Senators are waiting to hear from Americans on this and they will use a lack of interest as an excuse to do the wrong thing. Democrats and unprincipled Republicans would like nothing more than to rubber stamp this nomination and move on. So it will be up to regular Americans to let the Senate know what to do. And as we’ll discuss today, time is running out.

Joining me today are top conservative leaders in the judicial confirmation battle. I think it’s fair to say we have gathered here today some of the leaders in the opposition to Judge Sotomayor’s nomination although I don’t want to put anyone in a box that they don’t necessarily believe.

To my immediate right is Manuel Miranda, who serves as chairman of the Third Branch Conference, a coalition of over 200 organizations that Judicial Watch belongs to. It's a nationwide coalition engaged on judicial matters initially organized as the National Coalition to End Judicial Filibusters. He's also a visiting legal fellow at the Heritage Foundation and he served previously, importantly, as counsel to Senate Majority Leader Bill Frist leading the Republican Conference staff on judicial confirmations. He previously served as senior nomination counsel to the Senate Committee on Judiciary as well. Manuel was born in Cuba and raised in the state of New York City so that makes you Latin as well, right?

MR. MANUEL MIRANDA: That's right. And more qualified to serve on the Supreme Court. (Laughter.)

MR. FITTON: And he has degrees from Georgetown University School of Foreign Service and University of California Hastings School of Law.

We're also pleased to be joined by Curt Levey, who's executive director of the Committee for Justice, the premier organization devoted to putting constitutionalist judges on the Supreme Court and the lower federal courts, an important matter that we can't ignore which is the lower courts and the appellate courts. There's some nominations there maybe we should talk about. After graduating Harvard Law School with honors and clerking for the U.S. Court of Appeals of the Sixth Circuit, Mr. Levey served as director of legal and public affairs at the Center for Legal Rights, a public interest law firm in Washington, D.C. There he worked on landmark Supreme Court cases including the University of Michigan affirmative action cases that were decided a few years ago.

And we're also honored to be joined by Roger Clegg, who's president and general counsel of the Center for Equal Opportunity. He also focuses on legal issues arising from civil rights laws, including regulatory impact on business, the problems in higher education created by affirmative action. A former deputy assistant attorney general in the Reagan and Bush administrations, Clegg held the second highest position of both the civil rights division there and the environmental and natural resources division – certainly two divisions that needed conservatives no matter who's running the show there. He's held several other positions in the U.S. Department of Justice including assistant to the solicitor general, associate deputy attorney general and acting assistant attorney general in the Office of Legal Policy. So a real expert. He's a graduate of Yale University Law School.

As you can tell, we're really lucky to have these individuals here and the timing could not be better. Hearings are scheduled to begin on Judge Sotomayor's nomination on July 15th, but in terms of schedules, the Senate goes into recess for a period of time. How long?

MR. : A week.

MR. FITTON: A week after July 4th so they need –

MR. : Fourth of July actually.

MR. FITTON: Right. So they're gone and they need to hear from citizens when they're back home about their views on the nomination. But to start off, I'll start with Kurt, who's been doing numerous work in terms of – or equal to the problems of the Sotomayor nomination.

Curt Levey.

MR. CURT LEVEY: Thank you, Tom. Let me tell you a little bit about the Committee for Justice, which I head. Our mission has always been the rule of law, which is synonymous with ending judicial activism, and we particularly focus on the nomination and confirmation of judges. Under Bush we focused on getting constitutionalists nominated and confirmed. Now, our mission may be a little bit different – trying to limit the damage from the judicial activists that Obama would appoint.

We've been around since 2002 founded by Ed Rogers and Boyden Grey. And although we're best known for the Supreme Court fights, frankly, it requires at least as much work for the fights over the courts of appeal.

For example, some of Bush's nominees, well known nominees like Bill Pryor, Janice Rogers Brown, and most famously Miguel Estrada were obstructed by the Democrats pretty much in unprecedented filibuster based on ideology.

And the experience of Miguel Estrada is particularly relevant here. He was going to be very likely the first Hispanic Supreme Court justice and that's why Democrats and groups on the Left, including many Hispanic groups, did not want him on the court. Manny did a great job of uncovering memos from the Democratic staff in the Judiciary Committee that explicitly spelled out – from groups on the Left – we don't want to let Miguel Estrada through because we don't want him to be the first Hispanic justice.

So it's only because they succeeded in blocking this extraordinary nominee, who, by the way, unlike Sonia Sotomayor really did grow up in poverty, came to this country not speaking English, from Honduras – where exactly I always forget. Manny?

MR. MIRANDA: Honduras.

MR. LEVEY: I confuse the two. But in any case, a true American success story. And again, they just absolutely ruthlessly tore him apart. They hurt his family. His wife shortly thereafter committed suicide and it was just a horrible personal experience.

And so it's really ironic now when Democratic senators, groups on the left and especially Hispanic groups say that virtually any opposition to Sotomayor is racist. They

conveniently forget what they did to Miguel Estrada. And he dropped out. Again, it was just much of a strain on his family. So, of course, nothing that Republicans can even imagine doing to Sotomayor would match that.

But you know, there's a lot of Republicans who say, why fight? She's probably going to be confirmed. I don't think so much of Republican senators, but you know, some of the people who purport to worry about the Republicans being too conservative. Certainly the media would love to see the Republicans fold their tent here.

But you know, we've already had a nominee this year who shows that even with only 40 Republican senators you can stop Obama's nominees. I'm talking about Dawn Johnson who was nominated to be the head of the Office of Legal Counsel at the Department of Justice. And because a few red-state senators became convinced that she was just too radical, her nomination is going nowhere. I can't guarantee that she'll ever be confirmed, but it certainly appears to be dead at this point.

So you really don't need – it's not about a filibuster stopping a nominee. Republicans have never filibustered a judicial nominee and are not going to start doing it now.

If Sotomayor or really any of these folks are going to be stopped, it's going to be stopped because red-state Democrats, either publicly or privately, express their doubts and then the nominee will just – the nomination will just wither. You know, sort of a Harriet Miers scenario where doubts have been planted immediately about the nominee as has happened with Sotomayor and then instead of the nominee soothing those doubts, they just increased.

And again, I'm not predicting that's what will happen with Sotomayor, but that's certainly the scenario under which she would be defeated. But you know, even if she's not defeated – and you know, there are even conservatives who say, well, we'll just get another liberal.

So a lot of the goals that we're focusing on really are on having a – and Manny has used this term – a “great debate” about the nominee. And the types of goals that I'm talking about accomplishing without stopping her confirmation is just make the – frankly make the cost high enough and the debate thorough enough that President Obama decides it's not worth it, especially because these types of debates drag him into the area of social issues, you know, gay marriage, partial birth abortion, affirmative action, Second Amendment – places he clearly doesn't want to go. He's done everything possible to stay away from those issues. And so even having to deal with those is a cost to him and will make him moderate his future picks.

Number two is I feel – a lot of observers feel, even folks on the left will say, grudgingly, well, this is the one judge on one issue that you know, she'll advise well, the one issue that works in her favor. I hope things aren't that bad with the Republican Party now that it's only one issue but it's certainly an issue that over the last decade has worked

in Republicans' favor time and again when they've decided to focus on it. And it certainly puts red-state Democrats in a difficult position.

We can also – putting politics aside, I think this is an important teaching moment. It's the first time in most of our lifetimes that there will be a great debate or even a moderate debate over a Democratic nominee to the Supreme Court. Breyer and Ginsburg are the only other two in our lifetimes did not – there was no great debate. There was no great fight and I'll get into that more in a little bit.

But another thing that makes us – besides being the first of our lifetime, it's also a great opportunity to have a great debate about the role of judges because Obama and Sotomayor, as Tom talked about, have been so honest about what they're looking for. I mean, they both are on record as they don't use the word "judicial activism" but they use every possible synonym for it, you know, taking empathy for certain groups into account, taking one's life experiences into account, one's, I think, heritage, one's perspectives. It all comes down to "I'm not just going to look at the law and facts." That's basically the difference between rule of law and judicial activism.

Also on the point about whether Sotomayor can be stopped, one thing I learned from the Bush days is, you know, it's not enough – somebody may be opposed because they're too liberal or they're too conservative. But in the end of the day, if they're willing to stand there and fight, that's not enough to stop them. It has to be ideology plus other problems.

And in that sense, Sotomayor is very vulnerable. She's got a lot of problems, so much so that my initial reaction, you know, the first hour after I heard that she was nominated was a little bit of shock and to say, huh, you know, obviously I didn't think he'd pick someone with this much baggage. He obviously was more influenced by her being a Hispanic woman than I would have guessed and less influenced by factors that people had talked about such as he's going to pick the greatest mind on the short list, somebody to really stand up to Scalia. You know, Sotomayor is a perfectly bright woman, but I don't think anyone thinks she's an intellectual heavyweight on the level of a Thomas or a Breyer, even a Souter.

So what are these factors beyond ideology that make her vulnerable? Well, let's start with her temperament. Whether you talk about in liberal law professors like Jeff Rosen and Jonathan Turley have talked about this, whether you're talking about the people that she works with, the lawyers that appear before her, the ratings that she gets in various polls of lawyers, this is somebody who's not very pleasant on the bench. It's someone who's difficult to get along with if you work with her, somebody who people have described, frankly, as mean. I don't know how that squares with empathy, but we all know, again, empathy doesn't really mean empathy. It's a code word for favoring certain groups. So temperament is one problem.

Statements she's made, perhaps her biggest problem, are racially divisive statements she's made such as the fact that wise Latina women would, most of the time,

make better decisions as a judge than a white man. I'm not sure where Latino men fit in, but certainly somewhere in between.

MR. : (All across ?). (Laughter.)

MR. LEVEY: You know, people have said, is she racist because of that? I'm not going to brand someone as racist that easily. I'm not going to play the game that the left plays, but it's certainly a racially divisive statement and it gets into notions of racial superiority. And as Tom pointed out, she even talked about there being intrinsic differences between Latinas and white men that account for the difference in how good a judge they are. So again, ask yourself if a white nominee – a white male nominee had said that, how you would feel.

Then there's a number of ethical questions. You know, I think – well, the most obvious are the code of conduct for federal judges requires that you do everything possible to maintain the appearance of impartiality. She's on the record in speeches, law review articles, saying, I don't think judges can be impartial so they probably shouldn't even try.

And then she's done specific things. She, just two months ago, gave a speech raving about the election of Barack Obama. You're not supposed to do that as a judge. She's written – you know, called very strongly for more campaign finance, criticized Congress for not doing more. You know, I think it was quite obvious to see how that would affect her impartiality especially since campaign finance cases regularly come before the Supreme Court or among the most important cases coming before the Supreme Court.

You know, and don't just – you know, don't take my word that these are ethical problems. Look at the Second Circuit that she sits on. They already reprimanded a judge for criticizing Bush, so criticizing Bush, praising Obama, you know. Should there be a complaint against her, I think they'd have hard time say – not reprimanding her, frankly, if they still have jurisdiction over her, she hasn't yet moved on to the Supreme Court.

There were also her statements endorsing judicial activism, again, where she's used – speech after speech talked about how the rule of law, objective rule of law is unattainable. She's come very close to saying that it's really a tool the white man used to oppress minorities and that judges – appellate judges are policymakers. You know, again, she's been unusually forthright about that, but it does make her more vulnerable now.

And you know, also getting back to the ethics question, we have the way she's buried her most important and controversial decisions are ones she dealt with in brief per curiam opinions that barely touched on and sometimes didn't touch on at all the important constitutional questions.

Now, for those of you who are not lawyers, per curiam opinions 99 percent of the time unused because it's an uninteresting, unimportant issue and it's not worth writing a long opinion. In rare occasions, they're used basically to avoid – well, basically to avoid having to take responsibility for your opinion and that's clearly – the second category is where she falls. Now, you can do that once, maybe, but if all your most important decisions fall in that category, I think that's a problem and that's a pattern. And she's going to be asked about that. Senators have already – have mentioned that.

You know, she's made other injudicious statements over the years and I think, frankly, one of her problems is that she's opinionated and then – you can say she has loose lips, and I think that's going to haunt her when she gets to the hearings. I think she's going to be more like a Bork at the hearings and she will – probably will be – she has 20 years of experience to look on, but I don't think she's going to be able to be as restrained as an Alito or a Roberts.

Now, again, as I alluded to earlier, some Republicans have predicted that – I'm sorry – some observers have predicted that Republicans will roll over the way they did with Ginsburg. And I don't know if that's even fair. I don't want to blame anyone here, but the point is there could have been very vigorous opposition to Ginsburg. As general counsel of the ACLU and in other parts of her career, she had said all kinds of outrageous things. She said that mothers and fathers day should be abolished. She had said prisons should be coed. She had said that the right to privacy probably protects bigamy and prostitution. I have a list of probably a dozen things like that. When I looked at it, probably one or two of those would have been enough to stop her, but there are only three votes against here.

I don't think that's going to happen this time. I think all indications are Republicans realize that this is an issue that works in their favor. Especially in the last few days, Republicans have started to get quite vigorous. And you know, frankly, before that, she deserved – you know, you should not come out on the first day and denounce a nominee. You should keep an open mind. But as you look in her record, I think it's fair to raise the questions that you have.

And in those last few days, the senators have addressed issues like her 12 years on the board of the Porto Rican Legal Defense and Education Fund. They took some pretty radical positions all of which by the bylaws had to be improved by Sotomayor, who even was head of the board at one point.

They talked about reaching the case where she favored racial preferences, again, without many explanation of why. I won't get into that much because I know that Roger is going to talk about that, except to say that – you know, that's a great example of the problem with the empathy standard which is, you know, who should you be empathetic for?

Should you empathetic for the minority firefighters who didn't do well on the New Haven civil service exam, and that's why the exam results were thrown out, or

should you be empathetic for someone like Ricci who spent hundreds of hours and thousands of dollars studying for it and did well? I mean, again, who should you be empathetic for?

And that's why liberals like that standard because really, you can be empathetic for whoever you want and so really is just an excuse for legislating from the bench. And since a lot of people think that elite lawyers are better at deciding the nation's great social issues, then the unwashed masses, for example, in California – the masses aren't even around Washington, California, they're quite liberal but still people think you can't leave important decisions like gay marriage up to the people, even liberal people. And so that's why they like this standard – a standard for judging.

They've also stressed the Second Amendment in the last – yesterday especially they held a – the GOP Center has held a press conference and stressed the Second Amendment and talked about it on the floor. And I think that's really a key issue. You know, the group that we think of, the interest group that we think of as most important in opposing judicial activism is the pro-life groups.

But the Second Amendment folks, supporters of gun rights, have the potential to be much more influential. They're certainly just as large, but red-state Democrats listen to them, are afraid of them. Pro-life groups – they've already sort of factored in that they're going to be criticized for being pro-choice, but again, in states where gun rights are important and there are Democrats – Alaska, Montana, the Dakotas, Virginia, Arkansas, Louisiana – where Democrats are, well, basically afraid to anger the NRA and other gun rights groups.

And you know, like I said, this is a constituency that hasn't been involved before largely because the Second Amendment was effectively nonjusticiable. By nonjusticiable I mean not something determined by the courts. But the big Heller decision – and tomorrow will be the first anniversary of that – changed all that. It really put the issue in the courts the way that Roe put the abortion issue in the courts 35 years ago.

Really all the important aspects of the Second Amendment now are really up to the judges and largely the Supreme Court, whether it applies just to D.C. or whether it's incorporated to the states, what the standard of review is, Heller really did not give us a standard of review. And again, if any of you are lawyers, you know that the standard of review makes all the difference in the world on whether it's closer to rational basis or strict scrutiny. And even if one of the five center-right justices are replaced by Obama, then really even the survival of Heller, at all, Second Amendment at all as an individual right is imperiled.

So again, there's every reason for the gun rights groups to get involved, but we really didn't know – it was somewhat speculation until yesterday. Gun Owners of America have gotten involved, other prominent Second Amendment advocates had gotten involved but the NRA's top leadership had been silent. And that changed

yesterday because the leading member of the NRA board, Sandy Froman, the past president of the NRA, lifetime member of their executive council, quite aggressively urged opposition to Sonia Sotomayor in her op-ed that just came out yesterday evening. She's the top legal mind at the NRA. She's a former law professor at Harvard Law School grad.

MR. : Where's the op-ed?

MR. LEVEY: Town Hall is the first place I saw it. And she – one thing I liked is she talked about – she really talked about it in political terms, which is how one has to look at it. She said, you know, the gun issue stopped Gore and helped to defeat Kerry. There's no reason we can't do it again with Sotomayor.

And I'll just read you – just to finish up I'll read you a quote from Cornyn at yesterday's press conference. He said: "This is the first time that I know of in our nation's history that a Supreme Court nomination will revolve around a nominee's commitment to the Bill of Rights and most particularly the Second Amendment to the Constitution," specifically at the moment, all the other parts of the Bill of Rights with one tiny exception have been read to apply to the states. Well, the Second Amendment because it's the conservative part of the Bill of Rights will not apply to the states. Sotomayor has said that it doesn't. You know, when it comes to a choice between people wanting these guns for self-defense – crime victims would-be crime victims – and those who oppose guns, we know where her empathy standard comes down. It comes down against gun owners.

Thank you.

MR. FITTON: Thank you. Well, she has said that the Second Amendment does not protect the fundamental rights. You wanting a gun is not a fundamental right according to Judge Sotomayor both pre and post-Supreme Court decisions that suggested that it might be.

Roger, you may have to leave early because the decision that we've been talking about or the pending decision may come down in 20 minutes, so please forgive him presumptively if he has to leave because obviously his organization and getting – (inaudible) – issue is going to be needed that Roger respond on behalf of his organization – (inaudible) – generally. But Roger, I give it to you.

MR. ROGER CLEGG: Thanks very much and I appreciate your intervening so accommodating to my schedule and actually I'm going to ask one of our summer workers, Andrew, that if when it gets to be 10:00 a.m. if you could go check in with the office and ask them to let us know if the New Haven decision comes out and if so, give me a high sign and I'll skedaddle out of here.

MR. : It's right out here, you mean outside – here at the –

MR. FITTON: We've got plenty of Blackberries here. (Laughter.)

MR. CLEGG: Okay. I want to thank you, Tom, not only for being so accommodating to my schedule, but for the great work that you've been doing in the area of judicial confirmations and of course that goes also for the fine work that Curt's doing and that Manny is doing. You all are really impressive triumvirate and I thank you on behalf of not only the Center for Equal Opportunity but for – but on behalf of the American people for all the important work you're doing.

And I'm heartened that this particular nomination is starting to develop the grassroots opposition that I think is going to be necessary in order to defeat it. And I think it's significant that last week Senator Jeff Sessions, who's the ranking Republican on the Senate Judiciary Committee, said that he was looking forward to a teaching moment during the next few weeks on the role of judges and also on the issue of affirmative action. And what I'm going to be talking about today in large part is how those two issues come together.

It's very interesting. We would have something like a perfect storm, I think, brewing. We have a Supreme Court nominee who apparently does not understand or appreciate the judicial role. It seems that her lack of understanding in particular involves issues of race and ethnicity and gender.

One of the decisions that are exhibit A in why we should be concerned happens to be before the Supreme Court right now. It would have been a page one decision no matter what, but now, on top of everything else, it's a decision that I think is likely to be reversed that was written by a judge who's been nominated to join the Supreme Court.

That case involves affirmative action, involves racial preferences, an issue that is extremely controversial, and the use of racial and ethnic preferences is extremely unpopular among Americans who we've talked about the abortion issue, talked about the Second Amendment. I would add racial preferences to that as one of the top legal issues that Americans feel very strongly about.

And as important as these other issues are to conservatives, the thing that's interesting about racial and ethnic preferences is that I think that nobody across the political spectrum likes that kind of affirmative action. And this is not something that only Republicans oppose. I think that most Democrats are very unhappy with people being told, that you know, you're not going to get hired because you're the wrong skin color, or you're not going to get admitted into the college you would like because you're the wrong ethnicity, or you're not going to get a government contract because you're a man rather than a woman. So these are extremely important and emotional issues – issues where I think a lot of empathy is involved.

I also think that it's significant that we have an African-American president for the first time in our history. And that is, I think, an (epochal?) event that is causing a lot of Americans, even those who might have been willing to accept this affirmative action

for a long time think that, well, you know, maybe the time has come where we ought to be moving beyond that now. So we have all of these issues coming together in what I think it's going to be a very interesting way over the next few weeks during Judge Sotomayor's confirmation hearings.

Let me back up, though, for a second and talk about the first issue that Senator Sessions said he was looking forward to a teaching moment on, and that is the role of a federal judge. When somebody's nominated to be a Supreme Court justice, there are a number of qualifications that we look for, and Curt has touched on a number of these.

One of them is simply judicial temperament, and I think Curt's right that there are some red flags there. Judge Bork, in an interview in the *Newsweek* this week, talked about Judge Sotomayor's reputation for bullying counsel, which is not something that is a hallmark of good judicial temperament.

In addition, Curt talked about, you know, possible ethical issues that should be explored by the Senate Judiciary Committee. He talked about the use of per curiam opinions. I would add to that, Curt, that in the initial ruling in the New Haven firefighters case, the panel was not going even to issue a per curiam opinion. It was going to dispose of the case, as I understand it, by summary order.

I think that the rules – the judicial rules on what kind of case is appropriate for handling by a summary disposition were clearly not met in this case. You know, it would be very interesting to ask Judge Sotomayor how it is that, nonetheless, this panel got together and decided that they were going to try to bury the case this way, a case that clearly was significant.

This is a case that prompted a sua sponte, on its own (on law?) review by the Second Circuit, and then the interest of the Supreme Court, which granted cert, granted full review in a case, something that it does in only a tiny percentage of cases. How could this panel have thought that this was a case that should be buried with no published opinion at all? I think that that raises very important ethical questions and I hope that the Senate talks about that.

But that's just the requirements of being a Supreme Court justice. They're usually pretty easy to meet. You know, usually finding people who have the right judicial temperament and were not ethically challenged are pretty easy to do.

The harder one these days, unfortunately, is no less fundamental though, and that is if you're going to be a Supreme Court justice, you have to understand what the job of a judge is. Right? We wouldn't nominate somebody – we wouldn't elect somebody to be president if he really didn't like the legal constraints that we put on being president. Right?

We wouldn't vote somebody to be a member of Congress if this person sort of (validly?) said, well, you know, there are all these rules about what congressmen are

supposed to do in the Constitution. I really don't like them. I want to do something else when I become president. I want to do something that the Constitution doesn't really allow for. That's my ideal for what the president should do.

Why is it then we're willing to accept people as judges who are quite up front in saying that, you know, this idea that the framers had for what judges are supposed to do is not really something that I'm comfortable with or that what I want to do. I have a very different idea of what a judge should do.

Now, you know, the phrase "judicial activism" gets thrown around a lot and I think there's a lot of deliberate misinformation or disinformation about what the definition of a judicial activist is. But it's really very simple.

Judicial activism is when a judge substitutes his or her own policy preferences for what the text of the law actually says. To put it the other way, what judges are supposed to do is look at what the law says, the Constitution or a statute, and then apply to the facts of the case before them. They are supposed to follow what the text of the Constitution or the statute says. They aren't supposed to distort it or ignore it or rewrite it or add to it or take away from it because they have a different idea of what they think that text should say. And that's all there is to it.

And if a judge decides that he doesn't like a law that Congress has passed or a state has passed, and so that therefore he's going to make up something in the Constitution that makes that statute unconstitutional, that's judicial activism.

But it's also judicial activism if Congress passes a law or there is a provision in the Constitution that makes something very clear and the judge decides that he doesn't like that law or doesn't like that constitutional provision and that therefore he's going to ignore it.

So you can be an activist by adding something to the Constitution that isn't in there or you can be an activist by taking something out of the Constitution that is in there. Either way, the judge is making up law. Right?

There is a lot of reason for the Senate Judiciary Committee to be very concerned that what we have with Judge Sotomayor is a nominee who is very up front in her belief that this is something that judges should do – that simply having a disinterested text-driven view of what the law is is not really something that she is comfortable with, that the way that a judge rules is not determined just by the text of the law in front of him or her, but by that person's life experiences and by that person's own view of what kind of law is needed.

And the reason that we're concerned about this is not just some of the opinions that she's written, but a lot of the speeches that she's given and a lot of her extrajudicial writings that make it pretty clear that this is a judge who believes that the judicial role is not something that is bound by the written law that they are supposed to be following.

Now, I don't want to go on for too long because I know there are some interesting questions that we'll get from the audience and also some good points that we need to talk about among ourselves. But I do want to talk about this New Haven firefighters case as a classic example of why we should be concerned, but in doing that I first want to acknowledge that Curt's quite right that it's not just in that – just in the area of affirmative action and racial preferences that there's reason for concern.

We have reason for concern with regard to Second Amendment. We have reason for concern with regards to copyrights. We have reason for concern with regard to campaign finance law. There are a lot of red flags out there and you'd expect that. If the judge thinks that – as a general matter, that it's okay to, you know, to add things to the law or take things away from the law, we wouldn't expect a judge to do that just in one particular area. We would expect this to be part of a pattern. And indeed, we've seen that.

But again, I think exhibit A is what happened in the New Haven firefighters case and one reason for that is that this is an area, if we expected to see judicial activism – given the centrality of identity politics and identity judging that we see in Judge Sotomayor's speech and writing, we would expect to see it in the civil rights area. And low and behold, that's exactly what we see.

What happened in the New Haven firefighters case was that the city of New Haven needed to promote some firefighters and so it very carefully came up with a test to decide who was going to get promoted. And they went to a lot of trouble to do this. This was a custom made test that they came up with. And they administered the test. And they needed to promote 20 people and as it turned out, the 20 people who scored highest on the test were 18 whites and two Hispanics and no African-Americans.

Well, this resulted in a lot of unhappiness among New Haven City officials. And they were getting a lot of pushback from the local Al Sharptons and Jesse Jacksons out there. And so they decided they were going to throw out the results of this test, that they weren't going to promote anybody because the people who were going to get promoted, who had earned promotions, were the wrong color.

This included people who'd made a lot of sacrifices in order to study for this test. One of them, the lead plaintiff, Frank Ricci – this gentleman who is dyslexic, he had to pay somebody thousands of dollars to take all the written materials that he had to study, read them onto audio tapes so that he could listen to them rather than read them. A lot of people quit jobs, quit extra jobs that they had so that they would have more time to study.

Judge Sotomayor apparently did not have a lot of empathy for those folks because the Second Circuit, on the panel that she was on, ruled in this per curiam opinion that Curt was talking about that there was no illegal discrimination in that, that even though clearly the reason that the results of this promotion exam were thrown out was because who did well on it were the wrong skin color, that that wasn't a violation of the laws that

make employment discrimination illegal or the part of the U.S. Constitution that makes it illegal for state and local government to engage in racial and ethnic discrimination. That's the decision that's before the Supreme Court today.

That's the decision that Judge Sotomayor wrote, and that's the decision that I think it's going to be front and center when the Senate Judiciary Committee asks Judge Sotomayor about what her judicial philosophy is and whether she's willing to follow written laws even when they are inconsistent with what she would prefer those laws to say in a politically correct universe that she would like to build for all us.

I think I'm going to stop there.

MR. FITTON: Okay. Thank you. I really appreciate your insights.

Manny has been doing great work as a volunteer – (inaudible) – and many times coordinating conservative sponsors in support of or against certain nominees, and that's tough work. I – (inaudible) – in some respects. I'm sure he's going to tell us. But he has important insights to the process and generally speaking with this nomination and what conservatives and Republicans and presumably Democrats ought to be doing to prevent that.

Manny?

MR. MIRANDA: Well, just to start off to make my colleagues here envious of me, I was much like Sonia Sotomayor. I grew up in Queens, not Bronx. Much like her father, my mother was a factory worker. I benefited from the Catholic school system of New York City. And probably like her, I made my own breakfast in the morning and packed my own lunch and had all the experience of latchkey child, of which there are many in New York City. That makes more qualified to be a Supreme Court justice than my colleagues to my left and right.

And then, in addition to that, I'm an excellent meringue dancer. (Laughter.) I, as a matter of fact, have as a staple of my diet black beans and rice. And that really is a factor that has been overlooked in the rest that has been created by this president in favoring those who like red beans over those who like black beans. (Laughter.) Not to mention the rift over salsa, dancing salsa in the – (inaudible).

And as you can tell, because I'm making light of it, I'm not a believer that the Supreme Court should look like the deck of a bridge of a star fleet ship in its diversity. That's not the purpose. I would rather have someone who is entirely unlike myself, who loves the Constitution and respects its content and its text, and will preserve it.

And unfortunately that's not where we are right now. It's an unfortunate situation that we have a president who believes that a Supreme Court nominee, a Supreme Court justice should favor some party litigants that come before them over others. That's not quite what we teach people when we spend billions of dollars, as I've been part of in Iraq,

teaching people that judges should not be biased towards any party litigants, that justices should favor the text of the law rather than ignore the law or make it up as they go along. It is counter to what we have been trying to do in so many countries to make a constitution an anchor for liberty.

And that takes me back to something that George Washington – shall we start there? – George Washington was asked which of the three branches he would consider the most important? And unlike his protégée, Alexander Hamilton, he said, the third branch. Why? Because it would protect, he said, our liberties or take them away. And that's prescient, as the first president was wont to do, and it has been worked out exactly that way.

We now have a situation where American constitutional law looks very little like the American Constitution and that initial impulse – that great democratic impulse in human history that was to write down the law in the Constitution so that anyone could understand it without employing a lawyer, that has been relatively wiped away to the extent that I had a professor at Vanderbilt University Law School – this friend asked me, and he was quite earnest: do you really think that we should tether ourselves any longer to the text of the Constitution? And he was serious and that – I'm sure he taught constitutional law. (Laughs.) I suspect that's why he was there.

And so Judge Sotomayor is a representation of that kind of thinking and that's what I'd like to delve into because I don't think a lot of people have focused on this which is that you know, she's going to be unique – if she gets on the court, she's going to be unique in more than one way, not just the first Hispanic. She will be the product of her generation. She will be the product of an academic world from which she was benefited, in which she grew up, that is perhaps – I'm certain actually is not currently represented on the court. And that has not been – we haven't paid attention to that.

I suspect that what makes her – what influences her more than anything, more than being a wise Latina woman, is the fact that she is a product of this multicultural, (anti-hetero?) patriarchal, militant feminist – all these things that we have seen especially with her 25 years on college campuses. And she manifests all of those things.

I'm not too much concerned, unlike my colleagues, about her rulings on the appellate court. I'm not so much concerned about her as an appellate judge. And I don't know that her rulings are a problem so long as she stays on the appellate court because if she were to stay on the appellate court, she would be restrained by all kinds of institutions and precedents and limitations and her own colleagues and so on.

My problem is that given her views and given the times in the course of history, that she will step up to be one of nine members of the court that have shown themselves to take license with the Constitution and with the division of power in the Constitution, that she will join those who view the Supreme Court as the tricameral member of a legislative branch, that the Supreme Court is a third chamber of legislation. And that is very, very – that is very daunting.

It is daunting, and yet, unlike some of my colleagues, not necessarily the ones with me today, but unlike some, I don't think that this nominee will be stopped. She could be stopped in a couple of ways. Some of them have been articulated, particularly the combination of issues, particularly the combination of all the issues that have been discussed, particularly guns and courts, and also property issues, and that in combination with her temperament, because I agree with Curt that she's not – her temperament is not Ruth Bader Ginsburg's, David Souter's, John Roberts', Alito's, Breyer's. She's more like Warren from what we've read. I don't know the lady, but she may have that Hispanic gene which only I can speak to which desires to get in the last word. (Laughter.) So it may be a very interesting set of hearings like Judge Bork's was surprisingly interesting.

But what bothers me, given the fact that she is likely to be confirmed, is that – well, let me put it another way. This confirmation debate affords an opportunity that we didn't have in the election – the most recent election. It affords the opportunity to show the American people the consequences of their vote because I suspect that when they voted this past November for a very charismatic new president who happens to also be African-American – a great historical moment – they did not know that they were electing someone who would appoint judges who would rewrite the law and the Constitution as if they were there in 1776.

I suspect that when the American people voted in November, they did not understand that this president favored the view of the living constitution. And it's unfortunate that no one raised it to their attention because he actually wrote about in his last book, dedicated an entire chapter to judicial selection. That has to be a first among American presidential candidates and yet the opposing candidate thought that perhaps it was below us that he should talk about it, except perhaps in one speech John McCain gave in May of 2008 in Wake Forest University. It might as well have been in Tahiti on the day of the Democratic primary in North Carolina when he gave it. And no other mention.

And so, the American people didn't know that they were basically giving up their constitutional stewardship over the Constitution to judges who would be super legislators.

They didn't know about other things too. They probably didn't know that they were giving up the fundamental – the first civil right that we are endowed with in Article Six of the constitution that shall not pose religious tests in public office – in nominations and appointments to public office because I didn't – (inaudible) – that this president will not nominate to any court a faithful Baptist or a faithful Catholic in keeping with the teachings of the church, or any member or other people who have views about marriage or about life emanating from their faith, he won't nominate those people. It won't happen. We clearly saw in the last go round that Democrats even in the Senate would do anything to stop such people from serving on the court, and did. So the American people didn't understand who they were voting for or what they were voting for.

And so now we're in a situation where Democrats will do what Democrats are okay to do, get their nominee through. They will not be able – they are incapable of mirroring what conservatives did with regard to Harriet Miers when they told the president of their own party, including Republican senators – when they told a president of their own party that they could not support in good conscience the president's nominee to the Supreme Court. That will never be seen on the left and the president gave them a pretty good nominee from their perspective so their job is to get that nominee confirmed.

And so, in my view, it comes down to Republicans. Even though they're the minority, a very small minority, it is up to them to engage in this teaching moment, as Senator Sessions has now repeated. It is important that they do everything possible to engage the American people by using everything at their disposal to bring the issues to the fore in a way that they were not brought to the fore in the campaign, in a way that most people don't get an opportunity to think about them at the fore. That's what Republicans have to do.

Democrats, if they were true to their oath, would engage in that debate, stand up for their positions and let the chips – as has recently been said, let the chips lie where they may. But they too are trying to rush this nominee, the nomination through because at the end of the day, they benefit from not having any of these issues debated. They benefit from the lack of – (inaudible) – on these issues.

And so, now we're at a tipping point. Next week is the tipping point. If Republicans do not hear from the American people next week that they care and that they want this debate to be a great debate, they will likely come back and with the exception of the hearings, which will be very well orchestrated, maneuvered and worked, the exception of the hearings, this nominee will be confirmed before the August recess and probably with two or three days (of floor debate?).

And my guess is that Republicans will divvy up the vote with 20 for and 20 against. They will not have understood the great opportunity they have been given, as I think Curt pointed out, that this is the first opportunity, really, given what we now have seen the Breyer and Ginsburg confirmations, but this is a great opportunity to debate the nominee from a Democratic president. And it doesn't involve distortion. It can involve disagreement over what she said or not said in her rulings, but it certainly is all about the president who nominated her.

And one more final thing. Actually, I mentioned earlier the idea of being Hispanic. That should not be a cause for pause for anybody to engage in this debate. I want to think that that's not the way Hispanics think. I'd like to think that we can go beyond that. There are some who will think that, oh, because she's Hispanic perhaps should be given a pass.

Well, I share, as an American and secondly as a Hispanic, in the momentous, inspirational idea of having a Hispanic rise to the Supreme Court. It's not my priority, as I've said, but I share it. And that is why I fought vigorously for Miguel Estrada, who

President Bush was inclined to nominate to the Supreme Court and who – as Curt pointed out – who Democrats treated – (inaudible). And that is what we should remind people if someone dares to play the Hispanic card in this nomination. And remind them also that the wise Latina woman has experiences that somehow trump the experiences of a white man. Well, do they also trump the experiences of a black man?

Where do we stop the game and how far do we send that court which is the model, the – what's the word? Let me describe the word. I need not say the word. I took thirty members of the Iraq and Kurdistan boards, the boards – (inaudible) – to meet Chief Justice Roberts. And they're some very ornery people, some very angry people throughout the week that they were here in Washington. I got to know them very well and I knew some of them before.

And the most ornery of them, a Shi'a from a very war-worn neighborhood outside of Baghdad, who had been very difficult. When he sat in that court and he had Roberts in front of him, he stood up and he said, Mr. Chief Justice, this is the greatest moment of my life.

And that is the awe that people have for our Constitution, our rule of law, our system of justice. And we do it an injustice when we somehow treat it as we would treat the Democratic National Convention – establish quotas for who sits on them or suggest that we need to somehow politicize it and favor justices who will basically approach the matter – any matter with their personal bias of political inclination and even personal background.

MR. FITTON: Thank you, Manny. We appreciate that.

And if I could follow up with just a few points, what I found interesting most recently is these two polls, as best I can tell, suggest that a large majority of the American people still do not have an opinion on Judge Sotomayor. They don't know who she is and we assume here in Washington that everyone follows everything that goes on as closely as we do. The American people do not follow this issue as closely as we might think. They follow it once the confirmation hearings being if at all.

So to me, there's an opportunity not only in terms of the education aspect in terms of the divide between those who want to make the Constitution and those who want to protect it, but actually whether or not she's confirmed.

The second issue is – and I think it goes to Roger's point – it's not so much what she did in the appellate court as (an indication of?) what she'll do in the Supreme Court, what she did before, her activism. We released a report – Senator Sessions' echoed some points related to her tenure at the Porto Rican Legal Defense and Education Fund, a radical, far left organization that uses the courts to advance a race-conscious agenda, to be clear, among other things. And our pro-life friends, American United for Life, have pointed out that they've taken radical positions – you know, really retrograde positions on the abortion right that are so behind the times now that they ought to be embarrassing to

Judge Sotomayor. So it's an indication of just how radical she is to look at her tenure at the Porto Rican Legal Defense and Education Fund and – (inaudible).

And other folks have been focusing more recently on her stance on international law. And she's an activist on international law. She's given several speeches suggesting that, you know, listen to good ideas no matter where they come from, you know, Iran, Belgium, France, no matter what. Do you want a judge on the Supreme Court – a justice on the Supreme Court, who's willing to look outside of the Constitution to traditions and texts that may be inimical to our values to come to the result that she wants? And that's another point – she's a results oriented (judge?).

This whole legal realism philosophy that she has been proposing, which is incoherent in some ways, would suggest that she'll just say anything in the sense of – to get to the outcome she desires, including bringing in international law.

And going earlier to Curt's point, you would think that they would have gotten some of the key points right, and you would think that the – (inaudible) – requires to come in. And as I look more into her record – and given the basic qualifications, I assume – and not just the president's word for her – that she was an – (inaudible). She's smart in college and had done well in college. By her own admission, she did not do well on standardized tests and she blamed it on cultural bias. By her own admission she was a product, frankly, of the affirmative action movement in the '70s. And so her rise is not necessarily one based on merit by her own admission.

And I think that's – however uncomfortable it is for folks to raise it, it needs to be raised. She's not the highly qualified jurist that is being sold. She may be a perfectly good judge, and I'm sure she works diligently to come up on the court, and I understand she's a wonderful probably in person, but that's not the standard – this is not the best that Obama could have done even given his weak standards in terms of philosophy.

So I think there are – this is a woefully deficient nomination on a number of fronts and she should not have gotten out of the box given some of her qualifications and the issues in terms of her behavior on the bench, it's clear to me in the end.

Do you know what concerns me, Manny, and maybe you can address this initially, is that as soon as the nominee is announced it seems that too many Republicans and conservatives plan to lose, as opposed to planning to win. You know, they look at the numbers – you know, the Judiciary Committee, by the way, announced 12 Democrats, seven Republicans, and I guess the sentiments of many Republican aren't pretty good but it's a terribly – the hearings won't be as good as they might have been if the numbers were closer.

But what strikes me is that – and we're a nonpartisan organization party-wise – but the lack of leadership on this. I think this is a crisis. We have a president of the United States who's put forward a (lawless?) standard for a judge to make her judicial decision-making, and you know, presumably his nominees ought to be really given strict

scrutiny. And I don't see that attitude or I didn't see that attitude initially out of the box, which I think would have been appropriate.

I would have thought – frankly, I think it's appropriate to oppose her nomination out of the box given the fact that he continues to push forward this criteria for his judicial nominations. And I didn't see the leadership – I'm beginning to see more of it now, but two weeks before a hearing is a little late in the game in my view.

MR. MIRANDA: Yes. Yes and there's something to what you just said in that this is a president who altered the presidential standard. This is a momentous nomination because the president did that. Again, George Washington was asked who will he nominate to the Supreme Court, and he said, people of high character who show judiciousness – the opposite of bias – and who support the new constitution, which was quite controversial at the time as a common reading. That's the standard.

This president has repudiated that standard, particularly the judiciousness standard. He has indicated – he signaled that he would nominate a judge, and pick a judge who displayed – I suppose that they would apply empathy and personal bias. So I agree that from the very beginning, senators had an opportunity that was lost in the very beginning.

I argued early on that we shouldn't focus so much on her record at the beginning because that will come out in hearings and you get into it. We all sort of agree to stop her. But really an issue is the president's standard. That was the phenomenal moment that they should have all responded to, that he had altered that standard, signaled the kind of person he was going to nominate. It's really very significant.

I think we're in a crisis moment, but I'm a little bit of a partisan in this, but also from an American point of view, I think Democrats and Republicans – let's put it that way – Democrats and Republicans should begin to treat the confirmation process in a much more serious way and not just going through the kabuki dance that we will now see they're dancing, but in a much more serious way because they have an obligation to remind the American that they're the ultimate stewards when they vote.

When Justice Byron White was nominated, he went up to a hearing that lasted 15 minutes and he took all the three questions, which goes to show that at that moment the American people were slumbering and, as consequence, what has happened is that they have been stripped of rights, and other rights and powers created and so one while they slumbered.

And so the Senate has a duty to rise to this debate. Republicans – I think Democrats actually get it more than Republicans in this because they understand that this actually is very good for their fundraising. There's an asymmetry here. It isn't very useful with regard to fundraising on the right, and therefore Republicans are as not as alert to this issue because they get the impression that folks aren't really worked out about. They get that impression because they are not worked up about and they're the

ones that can spark the fire and it has been an enormous effort to get Republicans to understand that they have to spark a fire,, in part because – and this is – I won't get into this too much. I'll get into it by saying this. Democrats on the left function differently. When the Democrats ask the other groups to invest themselves, invest, it takes a lot of money to actually get involved in an issue. It takes resources and staff and interns and this, that, and the other. But when you are asked to invest an issue that's – we need your help in getting this out to the American people – what the Democrat groups understand is that they will have time for the payback; that is to say, they will recover their costs.

When the Republicans ask the outside groups to get out there and advocate and argue, the outside groups have no reason to believe that the Republicans will allow them to recover their investment; that is to say that the Republicans are asking the outside groups to do all the heavy lifting and there's no real credibility amongst them that they would some heavy lifting too to get the word out to the American people.

And unfortunately – then the political nature of it, the constitutional nature of it is that we have got to view this as a great debate, a great opportunity, and it starts with judging the ability to judge the president who nominates.

MR. FITTON: A quick question for Roger. Roger, in the – I guess some of the reasons you have for the slumbering opposition now, is that the perception is we keep replacing a very liberal justice. Is there any issue or is there any group of issues where he may actually move the court to the left as opposed to just changing this – or as opposed to preventing status quo where it's four justices with Kennedy in the middle?

MR. CLEGG: Well, that's a good question. I think that she – to put it this way. She is at least as liberal as Justice Souter and I think there's a lot of life in it, she's more liberal.

Again, the New Haven firefighters case; the Obama administration filed a brief with the Supreme Court that said that her decision, the Second Circuit, should be reversed. It's the Obama administration. And I think it's very likely that all nine justices, including Justice Souter, will come to that conclusion.

Now, they may disagree with the more – you know, Justice Souter and the liberal wing may disagree with the conservative plane on what the legal standard should be when the case is sent back, but I think that it's quite likely that it could be nine-zero that the decision of Justice Sotomayor, or judge – excuse me, Sotomayor was wrong. So that's just one example.

I think, on campaign finance she's problematic, on property rights. These are not my areas but these are other areas where there've been flags and those are areas, particularly property rights, where Souter has not been as bad as some other justices have.

Look, the other thing I would say, Tom, is that, you know, the argument that she's not going to be any worse is not very persuasive to me because, you know, she's a lot younger so that makes her worse.

And there's also the problem that I don't think that we lose anything by seizing on this teaching moment. We're not – sort of like in baseball. When you argue with the umpire, you know, the conventional wisdom is always, you're not arguing for this time. You're arguing for next time. And I think that Republicans and conservatives don't lose anything by saying that, you know, look, this is what the right standard is and we've got real concerns with this candidate.

MR. MIRANDA (?): Republicans are obligated, Democrats, all members of the Senate, presumably as officers in taking their oaths, they're all obligated to protect the Constitution. You know, on the wise Latina comment I think it's useful to point out that her argument there was not with us. It was with Justice O'Connor. She's there because Justice O'Connor retired. The search was limited to women because they wanted another woman on the court.

And Justice O'Connor said, oh, wise man and old wise man, or wise old men and wise old woman, they come to the same conclusion when it comes to a judicial decision making. And Judge Sotomayor said, I don't know about that. And I don't know what wise is. And in the end, I think a Latina woman with the experience – (inaudible) – would counter every decision or should, I would hope, than a white male – an extraordinary – you know, that comment – is she racist as a result of that comment? No. Is the comment racist? Yes.

And if she's not held to account for that by Democrats, you know, my expectation – you know – (inaudible) – picked Republicans the same thing, I don't think – I believe in powerful – so I think Democrats should be brought back into the (fold?) on the Constitution to put up.

MR. CLEGG: That's right. And I think that this is really – that statement really calls into question in a very fundamental way the rule of law. And it also call into question in a very fundamental way the principle that – the American principle that in my organization, the Center for Equal Opportunity has at its priority, as the principle the – (inaudible).

You know, we should all as Americans have certain fundamental things in common and one of them is the devotion to the rule of law and a willingness to follow that law in a way that applies it equally to everybody and is interpreted the same way by everybody. We're not black, white, Latino, Latina, Asian, Middle Eastern. First or foremost we're Americans. And that's the way that our legal regime should work.

MR. FITTON: Curt, do you have any final – I do want to get a question before we leave. We're running a little bit over.

MR. LEVEY: Just about the empathy and the wise Latino point. Again, if you don't think about it, it doesn't sound so bad. But ask yourself if you went before a judge and before the judge considered his decisions, he said, "You know, I've got an awful lot of empathy for your opponent." Would you feel like the judge was wearing the – (inaudible) – blindfold? No, you wouldn't. Or what if the judge said, "I think ethnic heritage is very important to judging and I noticed that your opponent, we're both Hispanic." I mean, again, would you feel like you were getting a fair shake? You wouldn't.

So again, look past the flowery language and ask yourself if you want the blindfold on justice or a judge who considers their various experiences and ethnic heritage and frankly prejudices. And you know, we can debate whether in other circumstances it matters what she did when she was on PRDLEF, she's told us that her life experiences are going to influence her judging. And there are 12 years on the board of PRDLEF are part of those life experiences. She's told us that judges are policymakers, so we ought to know what policy she supported when she was on the board of PRDLEF.

And so far, PRDLEF has refused to provide most of the documents requested not just by the Republicans but by the Democrats under judiciary staff. And just remember, the Democrats excuse for holding up Miguel Estrada for two years was that they didn't get all the documents they wanted. And in that case, the documents were protected by executive privilege. There's no such rationale here.

MR. FITTON: You know, I can probably get at least two questions in since I know – my past experience with these panels is that people want to give a full response. And I have two questions and I see – we have a microphone, so – (inaudible).

Q: Thank you. Is it not true that the Connecticut firefighters case will be decided by the end of this month before the hearing next month? And is it not true that concerning the tethering of decisions to a written Constitution is being reviewed in England where the English are trying to write a constitution, which I think is highly ironic.

MR. FITTON: Well, I don't know about the English example, but Roger, you're following this case very closely. It's either today or Monday that it will be released, right?

MR. CLEGG: Yes, I guess I did. Andrew, it did not come down today, is that correct?

MR. : I haven't gotten any messages.

MR. CLEGG: It's going to be on Monday. Okay. But the questioner is correct that it's due to come down before the end of the court's term and the court's term ends next week so it should be done in the next few days.

Q: Could it not be a game changer in terms of delaying vote?

MR. CLEGG: You know, I do think that they're both, delaying the vote. I think that there is already in the offing the possibility of delaying the hearings from July 13th probably to the following week. I don't think that that particular decision is going to be a game changer in combination with other issues. The fact – I think the fact that PRLDEF and others are holding back documents – that's a justifiable hearing delayer.

MR. FITTON (?): Well, explain that a little bit. The Puerto Rican Legal Defense and Education Fund – she was on the board making legal decisions as to what cases they get involved in for 12 years or so. She initially submitted to the Judiciary Committee nothing. After a group exposed that fact there was – (inaudible) – where she opposed the death penalty, she was submitted that late and subsequently submitted three or four or five documents that are non-substantive. There's nothing else from her tenure there.

MR. MIRANDA (?): But hourly the Judiciary Committee – actually both, it was a request by the chairman and the ranking member to PRLDEF to give up documentation that indicated – showed her role in some of these decisions. Now, I don't know what the PRLDEF is arguing an attorney-client privilege. I don't think that they can because I think she was a board member participating in these, rather than – not an attorney which was, of course, the reason why Miguel Estrada's documents from the Justice Department were not given over randomly – with bipartisan support they weren't given over randomly.

So tradition suggests that when there's material out there, both Democrats and Republicans will be convinced that there needs to be a delay. So I think that that could be used as a justification by Democrats to delay the hearings when in fact it's probably it's going to be a border of delayed hearings for an early – pre-August vote but they'll use that as a justification. I can see that.

MR. FITTON: Curt, do you have any ideas on the fact, the strategy over –

MR. LEVEY: Well, you know, I'm not so much concerned with when the hearings happen. I'm actually more concerned with the time after the hearings because, like I said, I hate she's going to say some controversial things. She's going to try to defend. It's just not her nature to back off some of the controversial statements.

And I particularly – so I certainly want time for a full and a fair debate over the things she says at the hearing, but I also frankly want senators have to go home for the long August recess and face their constituents. A lot of those red-state senators, you know, when they're home, they talk about social issues in a very conservative way, but, you know, then in Washington they look for a nominee who will undoubtedly say that gay marriage is a constitutional right, but doesn't believe that the Second Amendment is an individual constitutional right.

And I'd like to – and really people – senators from all over the ideological spectrum have to defend this to their constituents. That's how the democratic process should work, and if they can defend it honestly to their constituents and come back and vote for her in September, then she deserves to be confirmed.

MR. FITTON (?): Well, I think the reason they put the hearing on July 13th and seeking a pre-August vote is because they don't want to do this. If it were a normal nomination – frankly, under the Clinton administration they did have normal Supreme Court nominations in the sense that you had seen extremely liberal nominees put forward by the timing was lengthy in terms of a discussion, she wouldn't be at a vote until September, but they're afraid of accountability here and I don't think conservatives are honest Republicans. And, you know, this is a key issue.

The concern is that they will not be – the fight has been over whether a filibuster, not to deny in the end a vote, an opportunity for the Senate to have its voice heard, but a filibuster to provide enough time for the sort of discussion that we're talking about. My understanding is that you don't have enough Republicans who would support that.

MR. MIRANDA (?): Yes. I think that there are – what I would the McCain streak. The McCain streak, he's got more companions. They've all been voted out of office now. But the guys I used to refer to as the too cool for school. They were just too cool for school on the issue of judges. It wasn't their issue.

And now, McCain is relatively solitary. And he's got a couple of others that sometimes will be convinced that this just doesn't necessarily – it just isn't a great issue for a senator. We've got to do – here in the Senate we should be doing natural security issues and great legislative items like the Kennedy-McCain immigration reform. You know, those are the things that we should be doing. Judges, who cares?

MR. FITTON: Well, a senator finally became president after 45 years or so, so they all start thinking about it on both sides of the aisle.

MR. MIRANDA (?): Yes, but unfortunately, among Republicans, the conference is swayed from time to time by people who just don't think this is worth a lot of time. I've got that in writing. I'm working on an article right now where they make statements like that.

So that is the unfortunate situation that Republicans want to get rid of this nomination because they want to get on to other things. They don't think it will be a big payoff for them. When I say Republicans, I would say half of the conference I would bet. There are others who understand this issue. As I recently said, you kind of have to understand the Republicans senators sort of like in the way that you used to stare in school, at the grammar school you used to stare at that chart about when the various dinosaurs appeared in very different layers, the Pleistocene and the Mesozoic and all that whatever it is, and that's how you have to understand not only where they come from, but also when they were elected. Was this an issue at the time of their election?

And so there are – there’s about a dozen senators for whom this was an issue at the time of their election and are very sensitive to this issue. And they’re not all on the Judiciary Committee. But then you’ve got others including red-state senators who just – this issue just doesn’t play well, in part because we’ve never sent e-mails into Kentucky. We’ve never done radio and ad buys in Tennessee and Kentucky and so our leadership from Tennessee and Kentucky just don’t really value this issue as much as others do.

MR. FITTON: Well, you know, Judicial Watch is a grassroots organization and our members are concerned with that. We’ve got lots of e-mail about it and I think everyone will do well to enter the grassroots on this. And there are a lot of conservatives that don’t have the level of grassroots support – (inaudible) – trying, but there’s no doubt that the grassroots are concerned about this but they don’t have an effective voice in Washington, certainly in the Senate or anywhere else yet, and our voices being heard, to be fair to Senator Sessions, who is trying to bring these issues up in a regular way. But he’s a lone wolf in many regards there, unfortunately for him.

Roger, do you have any input there or thoughts on the tactics and strategy about timing and filibusters and such?

MR. CLEGG: Now that I’ve heard you all on that, again, I’ll just say that the issues that likely to be front and center at the hearings are good issues for us. You know, there was a recent poll by Quinnipiac College on the issue of racial preferences, and an overwhelming majority of Americans think that when you apply for a job or to get into a college or bid on a contract that your race and ethnicity and sex just should not matter.

MR. LEVEY (?): Including 75 percent of African-Americans.

MR. CLEGG: Absolutely. This is not a red-state/blue-state, black/white issue. This is a core issue that I think all Americans – or not all, but just about every American except for Judge Sotomayor or a few others agree on. And I think we should welcome having that issue – having a teaching moment on that issue as part of this in the future.

MR. MIRANDA (?): Because after all, the – (inaudible) – thinks that we’re cowards in the debate. We might as well be.

MR. CLEGG: Yes. We should bravely make it.

MR. FITTON: Well, one of my colleagues has often said the – (inaudible) – whether you can engage in racial discrimination to avoid lawsuits – (inaudible) – and that’s what affirmative action means again and again.

Any other questions? Yes.

Q: If you want us to do something within the next week. I didn't even know the senators on the Judiciary Committee. Tell me what to do, what you want me to do – and that applies to all of you – I will walk the halls.

MR. FITTON (?): Well, I think you should contact your home state senators and –

Q: Patterson. I live here.

MR. FITTON (?): Well, that gives you the ability to contact all 100 of them.

Q: I do. I do. Just tell me what you want me to do and it will be done.

MR. FITTON (?): And Internet activism is important. You cannot repeat these points that we're making enough. Anyone – the wise Latina comment, for instance, is not as widely known as you might think. It's in Washington and letters to the editor on issues like this in the immediate future I think are going to be useful. And I might say that's not only directed at our supporters here in the audience, but at anyone on the Internet who is listening to this, who will be listening to this, or anyone that sees a transcript of this.

In the immediate future, you need to contact your senator. You need to contact other senators. If you're a supporter of political committees, you need to contact political committees about it and you need to do your typical internet activism. E-mail your friends and family to do the same thing and write your letters to the editor. Letters to the editors in local newspapers in these states can have an impact, but it's got to be done within the next few days. And phone calls.

MR. MIRANDA (?): And phone calls. Every day, every senator gets a tally of how many phone calls they have gotten in their offices on 20 issues. Well, you'd be surprised how an indicator that is. These are not small, but they're daily. So 20 calls, 25 calls, 60 calls on a particular issue, that's phenomenal. That's incredible. That really rocks the boat. They really start paying attention. So those phone calls, encourage the family to do it. When I used to speak to Hispanic groups when I was on the Senate staff, I used to always encourage them, you know, the first thing you need to do is get your kids to call Congress. Get your eight-year-olds to pick up the phone and call Congress, get your 12-year-olds and that's the greatest civics lesson of all actually we should all be doing.

MR. LEVEY (?): And I would encourage you whether you do it yourself by walking the halls or call your friends and family in the various states, focus on those red-state Democrats. About 15 of them are big supporters of the NRA. And the Second Amendment is very much at stake here for reasons that I explained. As long as it remains fairly low profile – I don't think it's going to anymore after what happened yesterday – but if it could remain low profile, Democrats can get away with supporting someone as

hostile to the Second Amendment as Sonia Sotomayor. If that's a huge issue, they're not going to be willing to.

And again, we don't really need all 50. We don't even need 10 to get to 50. we just need a few to express their doubts and that way you ensure a great debate and might even result in the nomination being withdrawn. So again, that's where my focus would be.

MR. FITTON (?): This is the first nominee I recall in recent – that I recall where the Second Amendment is an issue. I don't think that you get anything – I don't recall ever – (inaudible) – inquiring about –

MR. CLEGG (?): Largely nonjusticiable before Heller a year ago.

MR. LEVEY (?): You know, the NRA, you can't be critical of their being somewhat slow to get involved, although now they are. You know, because for 130 years, their success was in the legislature and in the policy arena. But things have changed now. If it would be like in 1974 not realizing that the abortion fight was now in the courts instead of the state legislatures.

MR. FITTON: Just one more quick question. I don't want to hold up our panelists.

Q: When General Gilchrist, who is the head of Century 21 Minutemen, claims that in fact Sonia Sotomayor is also a member of La Raza, is that actually true?

MR. FITTON (?): She was.

Q: She was.

MR. FITTON: She was a member and a supporting member of that organization but not too recently, she was a member as a judge, which in my view is problematic again, because La Raza, despite its claims to the contrary, funds and has supported educational movements to suggest that the southwestern United States needs to go back to Mexico. It's a very race conscious organization.

Q: Yes, that's what I thought.

MR. FITTON: And that, to me, is another legitimate area of requirement.

Q: Yes, because La Raza, I understand, they are actually receiving taxpayer monies for various things. I don't know for what, but anyway, they are getting taxpayer monies.

MR. FITTON: Sure. There's isn't a lot – (inaudible) – for that. (Laughter.)

Q: Yes, but what I'm saying is that can you imagine what would happen if a group of Anglo-Saxons got together and called themselves "the race," an organization, imagine what would happen if that were the case.

MR. FITTON: So it's exhibit 21 on the whole race consciousness. And we have to move on to another – I have another quick question from someone who's been patient. Thanks.

Q: Okay.

Q: (Inaudible) – what your groups, all of you are going to be doing during the recess, if anything new or different, with regard to advertising. Obviously, we heard Tom talk about grassroots mobilizing, but to make sure that people hear about this in the districts and particularly if you have any – you talked about red-state Democrats. If you have any targets of –

MR. FITTON: Well, I am researching local advertising outside of Washington, D.C., and we also will be communicating with the Senate more directly, with the Judiciary Committee more directly on some of the issues that we'll be talking about, and putting it on the table. So I suppose just (complaining ?) on the outside, moving it through to be part of the procedures in the Senate and pressuring them on each specific one.

MR. LEVEY: In that past, we've never had a huge amount of money to spend, but we've very effectively used radio ads and to a lesser extent TV ads in red states with Democrats. And I guess one could say the good news coming out of the 2006 and 2008 elections is there is a bigger pool of targets now. There's more red-state Democrats. A lot of them are first timers so they're vulnerable. They're coming from and more conservative states, so they're more vulnerable. And that's our plan again.

Whether we're talking about going through state groups to reach the grassroots, or radio ads, we'll be targeting red states especially ones that are big on gun rights, like Alaska, Montana, the Dakotas, Virginia, Arkansas, Louisiana, some of the states even have two Democrats per state. So that will be where our efforts are.

And I agree with Manny. This next week is a big week because the senators will be home. So I think we'll probably wait in terms of our advertising budget. I think we need – now the debate has just turned, we've got it underway, we need to wait a little bit longer to see which red state Democrats are in play. But, you know, that's definitely the strategy; is the Dawn Johnson strategy: just get a few red-state Democrats to doubt the nomination and the nomination can quickly be dead.

MR. FITTON: And any advertising we would do, we haven't decided whether we will or not, you know, along the lines of Curt's talked about – (inaudible) – Democrats and Republicans.

MR. MIRANDA: And what's we're doing is we've been doing for a week now is concentrating all our efforts and any work to be done this next week on Republicans, particularly those in the leadership. And the organizations that are going to be doing e-mail blasts and other activities directed at Republicans.

At 12:15 p.m this afternoon, we'll have a small press conference over at the Dirkson Building, Dirkson 226 outside, Dirkson 226, and we will announce the result of yesterday's conference calls that we had in canvassing in which over 100 of our members – again, they're – (inaudible) – leaders and opinion-leaders on (the right?) and over 100 have responded unanimously that the final debate and vote should occur after the August recess, and so we will be announcing that and our request of both Democrats and especially Republicans to ensure that this nomination debate not be rushed before the August recess.

MR. FITTON: All right. Roger, I'm sure you're going to be busy with the follow-up on the Ricci case and do you have any insights in terms of your organization's activities?

MR. CLEGG: Well, with respect to Sotomayor, we'll be in touch with senators and Senate staff and we'll also be writing about it. I of course write frequently for *National Review* online and our chairman, Linda Chavez, did a column on – (inaudible) – I'm sure she'll be talking about it to.

MR. FITTON: Is Linda opposed to the nomination?

MR. CLEGG: Yes. We've put out a press release the day of the nomination expressing our disappointment.

MR. FITTON: Well, that's significant, Roger. She's not necessarily someone who's going to be lockstep on this issue, so it's interesting that she's opposing it. An independent thinker, Linda Chavez. Well, we appreciate your time.

MR. CLEGG (?): Another wise Latina woman. (Laughter.)

MR. FITTON: Yes. Truly wise. Well, we appreciate your time and we value your contributions obviously here and I guess the next thing to do is let's get to work.

Thank you.

(Applause.)

(END)